

Dang (Migration) [2019] AATA 2718 (30 May 2019)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Ms Thi Ha My Dang
CASE NUMBER:	1701123
DIBP REFERENCE(S):	CLF2013/72068
MEMBER:	David Barker
DATE:	30 May 2019
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa: • cl.801.221(c) of Schedule 2 to the Regulations

Statement made on 30 May 2019 at 9:29am

CATCHWORDS

MIGRATION – Partner (Residence) (Class BS) visa – Subclass 801 (Partner) – genuine spousal relationship – credible witnesses – saving for house deposit – sharing of day to day expenses – pooling of funds – living together with sponsor’s family – duration of the relationship – decision under review remitted

1.

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cl 801.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration on 18 January 2017 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
3. The applicant applied for the visa on 28 March 2013 on the basis of her relationship with her sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.801.221(2) of Schedule 2 to the Regulations because the delegate was not satisfied that the applicant was in a genuine relationship with her sponsoring partner.
5. The applicant appeared before the Tribunal on 23 May 2019 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
6. The applicant was represented in relation to the review by her registered migration agent. The representative attended the Tribunal hearing.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

8. BACKGROUND

9. The applicant is a citizen of Vietnam and is currently 31 years old. She first came to Australia in 2010 on a student visa.
10. The sponsor was born in Hong Kong, of Vietnamese descent. He is an Australian citizen by grant.
11. The parties claimed that they met at a wedding party of a mutual friend in November 2011 and that after this event a relationship developed between them, resulting in the sponsor asking the applicant to marry him in December 2012. They were married in March 2013 and the applicant was granted a Subclass 820 Partner (Temporary) visa in May 2014.
12. The decision record of the Departmental delegate who considered the application, a copy of which was provided with the review application, indicates the delegate was essentially not satisfied that the evidence available at the time of their decision demonstrated that the parties were in a continuing genuine spousal relationship. In summarising their concerns the delegate stated:

I have considered the four prescribed matters as detailed above as well as other information held on file.

You and your sponsor were married on 17 March 2013 and claim to have resided together for the past two years. You have provided minimal information about your relationship with your sponsor and you have not provided sufficient information to show the progress of your relationship since the grant of your subclass 820 visa.

The claims you have made about the financial and social aspects of your relationship, the nature of the commitment of your relationship, and the nature of your household, lack detail and have not been sufficiently supported by documented evidence.

You provided limited evidence regarding financial arrangements as a couple, your living arrangements, your social activities and nature of the commitment of the relationship with your sponsor.

Based on the limited Information before me and my assessment above, I am not satisfied that you and the sponsor are in a genuine spousal relationship as you have claimed.

13. Prior to and at the hearing the applicant's migration agent provided additional documents to the Tribunal including but not limited to the following:

- Written submissions from the migration agent;
- statutory declaration from the applicant;
- Photographs;
- Witness support declarations;
- Tenancy agreement, Rent ledger and Correspondence addressed to the parties at Cambridge Street, Lidcombe / Berala, NSW (the Cambridge Street property);
- Correspondence addressed to the parties at Broad Street, Cabramatta, NSW (the Cabramatta property);
- Bank records;
- Taxation records.

14. The statutory declaration from the applicant states in part:

I, Thi Ha My DANG of [number provide] Broad Street, Cabramatta in the state of New South Wales 2166, do solemnly and sincerely declare as follows:

- 1) I am the Review Applicant.
- 2) I am also the wife of Hoang Van BUI.
- 3) I have read the decision refusal from the Department dated 18 January 2017 and I wish to respond as follows: -

Joint bank account does not appear to be used for day to day transactions; information provided does not demonstrate financial aspects of two people in a genuine relationship

- 4) My husband and I have a joint bank account with Commonwealth Bank which we use for our general spending and payment of our bills. We use the money in this account for our transport, food and eating, miscellaneous spending — all of which we consider to be day to day transactions.
- 5) Both my husband and I have joint access and jointly contribute to this account.

No evidence provided to support claim couple are working towards saving for a deposit.

- 6) My husband and I are both working. We have been saving money aside for our future but not enough to put a deposit on a house. We are still trying to save.
- 7) I am working part time and my husband is working full time however the cost of living is expensive. We can only save when we can.

Correspondence to residential home does not demonstrate couple are residing together as a genuine couple

- 8) I have submitted correspondence addressed to myself and my husband to our residential home as evidence that we cohabitate together. It is really difficult to have evidence to support the nature of how we live unless we are able to record and show our day to day life as a couple.
- 9) Generally, I do most of the cooking for the household as I only work 2 days a week. As we live with my husband's father and brother, everyone helps out with the cleaning and maintenance of the home. My husband and I do our own washing and laundry.

Does not appear to be commitment or progression of the relationship since its commencement

- 10) My husband and I have been married for over 6 years. We always stayed by each other's side. My husband and I are committed to our marriage as we love each other.
- 11) We have been working hard to save for our future as we would like to have children and a home of our own.
- 12) I disagree with the fact that the Department has viewed that there has been no commitment or progression in my marriage. My husband and I have evolved as a couple and our relationship has flourished as every year passes.
- 13) Despite what the Department has said, my husband and I both know how much we love each other and that our relationship is definitely genuine. We will keep fighting to the very end because all of this is not fair on us as we have a good marriage.

CONSIDERATION OF CLAIMS AND EVIDENCE

15. The issue in the present case is whether, at the time of decision, the applicant continues to be the spouse or de facto partner of the sponsoring partner.
16. The Tribunal has reviewed the documents in the Department and Tribunal files and notes that the Tribunal has considerably more documentary evidence available to it than was available to the delegate at the time of their decision.
17. Both the applicant and sponsor provided their oral evidence during the hearing in a straight forward manner, without unnecessary embellishment. The Tribunal formed the view that their oral evidence could be relied upon. The parties' oral evidence was consistent with the documentary evidence and declarations provided with the review application.

Whether the parties are in a spouse or de facto relationship

18. Relevantly to this matter, cl.801.221(2)(c) requires that at the time of this decision, the applicant is the spouse of the 'sponsoring partner', who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the related Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen and was identified in the Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring partner' of the applicant.
19. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a) - (d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and sponsors household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

20. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship.

21. The parties provided the Department with a copy of marriage certificate, issued by NSW Births, Deaths and Marriages, which states they were, married in Cabramatta, NSW in March 2013. The Tribunal has reviewed this document and has no concern as to its validity.
22. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

23. The financial aspects of the relationship

24. Joint ownership of real estate or other major assets

25. The applicant gave evidence she and the sponsor own no real estate. She said they currently have around \$16,000 in savings and apart from this their only significant asset is a car, worth around \$24,000.

26. Joint liabilities

27. The applicant gave evidence she and the sponsor do not have any joint liabilities.

28. The extent of any pooling of financial resources, especially in relation to major financial commitments

29. The applicant gave evidence that her and the sponsor's financial circumstances are such that they have no major financial commitments which they are funding through either pooling their funds or through individual payments. She said they do however meet vehicle related and household utility expenses from the joint account they hold with the Commonwealth Bank (CBA).

30. The delegate drew an adverse inference from what they deemed to be an unsupported claim the parties were trying to work towards saving for a house deposit. The applicant told the Tribunal that this is an ongoing goal, but due to her only having part time work, it is proceeding slowly. Given the cost of housing in Sydney at the present time and the parties modest employment earnings evidence by the available bank and taxation records, the Tribunal considers this to be a reasonable explanation for the parties to yet achieve home ownership.

31. Whether one person in the relationship owes any legal obligation in respect of the other

32. The applicant indicated the sponsor is the identified beneficiary of her work superannuation policy

33. The basis of any sharing of day to day household expenses

34. The applicant gave evidence that she works on a part time basis with Australia Post, earning a nett weekly income of around \$340. The sponsor is employed as a machine operator and has a nett weekly income of \$766. She said their employment earnings are deposited into their respective individual bank accounts and they then transfer funds into the CBA joint account. She said food, grocery, petrol, phone and other regular expenses are paid from the joint account. A review of the bank records provided with the review application corroborates this claim.

35. The applicant gave evidence that rent is deducted from the sponsor's individual account. She said that her father-in-law is not required to contribute towards regular household expenses and that these costs are essentially divided equally between her, the sponsor and the sponsor's younger brother.

36. *Assessment of the financial aspects of the parties' relationship*

37. The banking records and other financial evidence provided with the review application are consistent with the applicant's claims. The Tribunal accepts that both the applicant and sponsor sharing of day to day living expenses and pool their funds. There is no indication of the parties' owning any major assets together, sharing liabilities or having significant legal obligations with respect to each other. However, the Tribunal has drawn no adverse inference from this, or the arrangement whereby they share some regular household expenses with the younger brother of the sponsor. Overall, the parties' discussion of their financial circumstances was reasonable and plausible.
38. The Tribunal has considered all of the evidence that is currently available and is satisfied that the financial aspects of the parties' relationship are consistent with those of couple in a genuine and continuing relationship.

39. **The nature of the household**

40. *Joint responsibility for the care and support of children*

41. The applicant gave evidence that she and the sponsor have no shared responsibility for the care and support of children.

42. *The living arrangements of the persons*

43. The applicant gave evidence that she moved into the sponsor's family home in Smithfield after they made a commitment to their relationship in 2012. She said at that time the sponsor was living with his mother and younger brother, as his parents were separated. She said that she and the sponsor subsequently rented accommodation in Martin Street, Lidcombe and then rented a granny flat in Cambridge Street Berala, which the Tribunal notes is a suburb next to Lidcombe and that the parties have provided correspondence addressed to them in both of these suburbs, that is Cambridge Street, Berala or Cambridge Street, Lidcombe. The Tribunal does not draw any adverse inference from these address details, as a review of a relevant map of this part of Sydney indicates Cambridge Street is close to the border of these suburbs.
44. The applicant gave evidence that she and the sponsor currently live in a three bedroom rental property in Broad Street, Cabramatta, along with her father-in-law and brother-in-law. She said they moved there from the granny flat they were renting in Cambridge Street and that her father-in-law and brother-in-law were already living at that address. The Tribunal has reviewed the available evidence and is satisfied it, corroborates the applicants claim as to her and the sponsor's current residential arrangements.
45. As previously discussed in this decision, the applicant maintains that she and the sponsor continue to work towards being able to buy their own home. She said that this would be a point where they would establish their own household, as her mother-in-law is now deceased, her father-in-law intends to return to Vietnam to live and the sponsor's younger brother is likely to move out and establish his own independent life. The Tribunal is satisfied that this is a reasonable explanation for the parties planned future living arrangements.

46. *Sharing of the responsibility for housework*

47. As to any sharing of the responsibility for housework, the Tribunal accepts that most of the cooking and housework in the Cabramatta household is done by the applicant. She explained this was due to her having only part time work. She said her father-in-law also assists with respect to cooking.

48. Assessment of the nature of the parties' household arrangements

49. The Tribunal considers there to be nothing particularly unusual or untoward about the parties' household arrangements. The Tribunal considers the evidence suggests the parties are part of a larger, extended family household, but has not drawn an adverse inference from this at it as it is not unusual, given the cultural background of the parties. The Tribunal is satisfied the evidence in relation to the nature of the parties' household is plausible and supportive of a contention they are in a genuine and continuing relationship.

50. The social aspects of the relationship, including:

51. Whether the persons represent themselves to other people as being in a de facto relationship with each other

52. The Tribunal has reviewed the parties' taxation returns and is satisfied that they have declared each other's spouses to the Australian Taxation Office . The parties have also registered their marriage with NSW Births, Deaths and Marriages.
53. The parties gave consistent evidence that they have contact with the sponsor's family and with friends here in Australia. The documentary evidence, consisting of photographs, witness support declarations supports these claims.

54. The opinion of the persons' friends and acquaintances about the nature of the relationship

55. The Tribunal has reviewed witness support statements and photographs provided with the visa and review application. These include declarations provided over time to the Department from Thu Ngoc Diep, aunt of the applicant, Thi An Hoang, mother of the sponsor, Jenny Nguyen, cousin of the visa applicant and Andrew Tran, husband of Jenny Nguyen. The Tribunal notes these witness declarations re all quite brief in nature. The Tribunal has also noted the delegates concern that Ms Nguyen and Mr Tran did not disclose they had rented accommodation to the parties in their witness declaration and drew an adverse inference from this omission. The Tribunal has reviewed a further statutory declaration from Mr Nguyen, dated 14 May 2019, in which she points out that documents provided to the department included tenancy ledgers which show the landlord / tenant connection between the parties and her and her husband in relation to properties rented by the parties in Martin St Lidcombe and Cambridge Street, Berala. The Tribunal accepts this contention and has not drawn an adverse inference from the parties renting accommodation from relatives.
56. Included with documents provided with the review application are witness support declarations from the applicant's father-in-law and brother-in-law, which attest to the genuine of the parties' ongoing relationship and clearly set out the basis upon which their observations of the parties together support their opinions about the relationship. The Tribunal has placed weight on this evidence.

57. The basis on which the persons plan and undertake joint social activities

58. The parties gave credible evidence they jointly plan and undertake a range of activities together, including fishing, which is a long term interest of the sponsor and weekly visits to a

Buddhist temple in Cabramatta to pay respects to the sponsor's deceased mother. The photographic evidence they have provided supports these claims and also that they have recently socialised together with relatives and friends.

59. Assessment of the social aspects of the parties' relationship

60. On the basis of the written submissions from the parties, their oral evidence during the hearing and the available witness statements, the Tribunal finds that the relationship between the parties is recognised and supported by the sponsor's family and the parties' friends in Australia. The Tribunal considers the available evidence provides support to the contention they are in a genuine and continuing relationship at the present time.

61. The nature of the persons' commitment to each other

62. The duration of the relationship

63. The parties have been married since March 2013, a period of over six years and the Tribunal has placed weight upon this factor.

64. The length of time during which the parties have lived together

65. The Tribunal accepts the parties have lived together since late 2012, a period in excess of six years and the Tribunal has placed weight upon this factor.

66. The degree of companionship and emotional support that the persons draw from each other

67. The parties gave credible evidence of their regard for each other and of the emotional support provided to the sponsor since the death of his mother. The sponsor's evidence with regard to this factor was particularly convincing and the parties' ease in each other's company was demonstrable during the hearing.

68. Whether the persons see the relationship as a long term one

69. The parties gave evidence that they see their relationship as long term and that they intend to have children when their financial situation is improved and the applicant's visa situation is more certain.

70. Assessment of the nature of the persons' commitment to each other

71. The Tribunal has placed considerable weight on this aspect of the parties' relationship and views it as an indicator that they are in a genuine and continuing de facto relationship. I am satisfied the parties are in an exclusive relationship and that they have a mutual commitment to a shared life together. I am satisfied they see their relationship as long term and have placed weight on the duration of the relationship, which has now existed for over six years.

72. Conclusions on spouse criteria

73. The Tribunal notes there is no evidence to suggest either of the parties is in a relationship with a third party. There is also no evidence to establish the parties do not live together at the present time at the same residential address. I consider the financial, household, commitment and social aspects of the parties' relationship are indicative of a couple in a spousal relationship. I consider that the relevant test in this matter is whether at the time of this decision, it can be said that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of others. I am satisfied the evidence demonstrates such

a commitment. I do not consider the available evidence demonstrates any clear indicators that the parties' relationship is contrived, or that it is not at the time of this decision, ongoing.

74. With respect to the delegate's concern the evidence available to the Department in January 2017 did not demonstrate meaningful progression in the parties' relationship since the grant of the Subclass 820 Partner visa in May 2014, the Tribunal notes that the significantly more evidence available at the time of this decision does in my view display progression in the relationship.
75. Having regard to all the circumstances of this relationship, the Tribunal is satisfied that the applicant and his sponsor married in April 2015 and they are in a genuine and continuing relationship, that they have a mutual commitment to a shared life to the exclusion of all others, and that they live together, or not separately and apart, on a permanent basis.
76. Given these findings the Tribunal is satisfied that at the time of this decision the parties were in a spousal relationship.
77. Given these findings the Tribunal is satisfied that the requirements of s.5F(2) are met at the time of this decision. Therefore, the applicant meets cl.801.221(2)(c).
78. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 801 visa.

DECISION

79. The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa:
 - cl.801.221(c) of Schedule 2 to the Regulations

David Barker
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).